CHARITABLE USES IN NEW YORK.

THE year 1893 marks a notable change in the laws of New York regulating charitable devises and bequests to uses.[1] In that year the Legislature first attempted to undo what the courts of this State had finally held to be the intention of the Revised Statutes—the abolition of charitable, or perpetual and indefinite, uses. Only in 1873 had the controversy on this point been declared closed, and that there was no further room for contention: the Revised Statutes had in 1830 abolished charitable uses.[2] Thenceforth, every use, charitable or non-charitable, was subject to the rules against perpetuities and indefiniteness, or uncertainty. This conclusion proved the ruin of many attempted charitable foundations of magnitude; for testators persisted in devices to contravene the Revised Statutes.

Before entering upon the consideration of the act of 1893 it may be well to direct the younger reader's attention to the former English law of charities, applied in New York prior to its independence of the English Crown, and consequently adopted by the first constitution of the State as the fundamental law of the future. The former law of England divided trusts into two classes, charitable and private. If a trust were not for charity it must be for a definite, designated person, capable of invoking by name a *subpœna* and the aid of the Court of Chancery. But on the other hand, if the trust were for charity, or, in other words, to be classed as a "charitable use," then the rule against perpetuities applied only to the time of vesting, and the beneficiaries of the trust might be indefinite or even unascertained. Thus, the line between charitable uses and uses not charitable was distinctly known in the jurisprudence of the common law long prior to the first formation of the State government of New York. The distinction was adopted and applied in the colonial epoch and by the early Chancellors of the State of New York.

[1] C. 701, Laws of 1893. [2] Holmes *v.* Mead, 52 N. Y. 332.

The precise origin of the difference denoted in the law of England is, no doubt, due to the influence of the Roman clerics. Long before the Reformation the clerical chancellors, whose predecessors had introduced into England the Roman method of disposing of estates by last wills and testaments, had adopted the Roman-Christian law of charities. The early Roman law did not permit devises to uncertain persons[1]—"*personæ incertæ*"—or trusts for their benefit. But under Christian legislation *pia corpora*, or pious foundations, were made capable of taking by devise, while a trust for uncertain persons acquired validity from the pious purposes of the disposition.[2] By the time of Justinian, municipal bodies were permitted to take as heirs or under a trust—*fidei commissum*.[3] "The Saviour," an "arch angel," or a "martyr" could be appointed heir,[4] and these donations were construed as gifts to particular shrines.[5] In short, in the sixth century of our era the Roman-Christian law sanctioned gifts to indefinite persons, and gifts or trusts for indefinite persons if such gifts or trusts, were of a pious or charitable nature.

It is impossible to resist the inference that the earliest of the English lay Chancellors only adopted from their clerical predecessors the Roman-Christian law of charities. It is also the better opinion that the Lord Chancellor's jurisdiction over indefinite or charitable uses or trusts is quite independent of the Statute of Charitable Uses,[6] which was so long thought the only authority for so anomalous a jurisdiction. The laborious researches of two American lawyers, Horace Binney and his follower, Professor Dwight, established that fact. This being so, it follows that the Lord Chancellors only applied to charities a distinction of very early origin, and one to be accounted for only in the way indicated. The point is of consequence because after the repeal of the English statutes in New York in 1788,[7] the Chancellors continued to enforce charitable uses or trusts, and freely asserted that their jurisdiction was inde-

---

[1] Gaius 2, 238. [2] Poste, Gaius, *De Personis*, 156. [3] C. 6, 24, 8; c. 6, 48.
[4] C. 1, 2, 26 pr. [5] C. 1, 2, 26, 1; *cf.* Bracton, *f.* 286 *b*. [6] 43 Eliz. c. 4.
[7] C. 46, Laws of 1788; 2 J. & V. 282; c. 677, Laws of 1892; Levy *v.* M'Cartee, 6 Peters, 102, 110.

pendent of the Statute of Charitable Uses.[1] Although their opinion on this point has been since questioned,[2] it has not been overthrown.[3]

Assuming, then, as we must that chancery jurisdiction over indefinite, or charitable, uses was independent of the Statute of Charitable Uses,[4] we come next to the effect of the New York Revised Statutes of 1830, abolishing all uses except those definitively saved and enumerated.[5] Charitable uses were neither saved nor abolished. Consequently, soon after the Revised Statutes went into operation began a fierce legal struggle involving the determination of the continued validity of charitable uses. Those who maintained the validity of gifts to charitable uses affirmed that the Revised Statutes were intended to affect only private uses and trusts and that trusts for the public or charity were quite without the spirit of the Statute. It was well settled that the Statute of Uses,[6] vesting uses in possession, was never applied to charitable uses, and the Revised Statutes was only a revision and re-enactment of the old Statute of Uses, and might no doubt have been construed in the same way. But the letter of the Revised Statutes was unfortunately allowed to prevail, and after a disastrous struggle of forty-three years it was finally held that the Revised Statutes had abolished charitable uses, substituting therefor a new and complete system of charities through authorized gifts to charitable and eleemosynary corporations. Consequently, if a donation to the corporation was not valid in law it could not be supported in equity as a charitable use or trust.[7]

The reader will remember that after the Revised Statutes all trusts, not expressly enumerated and allowed,

[1] M'Cartee *v.* Orphan Asylum, 9 Cow. 437, 470; Dutch Church in Garden Street *v.* Mott, 7 Paige, 77, 79; Shotwell, Exr., *v.* Mott, 2 Sandf. Ch. 46. [2] Levy *v.* Levy, 33 N. Y. 97, 112.

[3] People *v.* Ingersoll, 58 N. Y. 1, 14, 15; Bascom *v.* Albertson, 34 N. Y. 584, 592; Holland *v.* Alcock, 108 N. Y. 312, 328; Ould *v.* Washington Hospital, 95 U. S. 303, 309. [4] 43 Eliz. c. 4.

[5] 1 R. S. 727, sec. 45; 1 R. S. 728, sec. 55: now secs. 71, 76, the Real Prop. Law. [6] 27 Hen. VIII, c. 10.

[7] Williams *v.* Williams, 8 N. Y. 525; Owens *v.* Missionary Society, 14 *id.* 380; Leonard *v.* Burr, 18 *id.* 96; Dodge, Exr., *v.* Pond, 23 *id.* 69; Beekman *v.* Bonsor, 23 *id.* 298; Downing *v.* Marshall, 23 *id.* 366; Levy *v.* Levy, 33 *id.* 97; Bascom *v.* Albertson, 34 *id.* 584; Burrell *v.* Boardman, 43 *id.* 254, 263; Holmes *v.* Mead, 52 *id.* 332, 339; Cottman *v.* Grace, 112 *id.* 299, 306.

if valid at all, were valid only as powers in trust. Charitable trusts, if valid, were powers in trust; but powers in trust were as subject as express trusts to the rules against perpetuities and uncertainty noticed above. For our present discussion, charitable powers in trust may therefore be designated "charitable trusts."

At first an attempt was made to distinguish charitable trusts of personal property from charitable trusts of lands, as the Revised Statutes did not enumerate the purposes for which trusts of personalty might be created. But as there were several sections of the Revised Statutes, subjecting future interests in personalty to the rules regulating the creation of future estates in lands, and as the genius of government dictated uniformity in the several rules, this attempt proved abortive and indefinite, perpetual trusts of personalty for charity were also held void.[1]

When at last it was finally determined that all uses and trusts must comply with the Revised Statutes, and that neither the public nor the charitable qualities of a trust purpose justified the relaxation of the statutory rules directed against perpetuities, the new law began its final processes of definition and elaboration. It may conduce to our understanding of the act of 1893 if we briefly indicate the rules judicially established prior to that year and governing the creation or limitation of a valid power, use or trust in New York. To constitute a valid trust, charitable or non-charitable, public or private, in either real or personal estate there must have been (1) a definite and certain beneficiary in whom the equitable title or interest vested.[2] (2) A trust purpose clearly defined and worked out by the settlor and not left to the discretion of a court of equity;[3] for in this State the judicial *cy pres* power was repudiated, or was attributed wholly to the royal prerogative, and consequently it never vested in the State judiciary.[4]

[1] Owens *v.* Missionary Society, 14 N. Y. 380; Levy *v.* Levy, 33 *id.* 97, 133, 134; Adams *v.* Perry, 43 *id.* 487, 497, 498; Holmes *v.* Mead, 52 *id.* 332; Holland *v.* Alcock, 108 *id.* 312; Cottman *v.* Grace, 112 *id.* 299, 306.

[2] Sherwood *v.* American Bible Society, 4 Abb. Ct. App. Decis. 227, 233; Holland *v.* Alcock, 108 N. Y. 312; Fosdick *v.* Town of Hempstead, 125 *id.* 581; Tilden *v.* Green, 130 *id.* 29; People *v.* Powers, 147 *id.* 104.

[3] Owens *v.* Missionary Society, 14 N. Y. 380, 406; Bascom *v.* Albertson, 34 *id.* 584, 592; Prichard *v.* Thompson, 95 *id.* 76, 81.

[4] Beekman *v.* Bonsor, 23 N. Y. 298; Holland *v.* Alcock, 108 *id.* 312, 330; Tilden *v.* Green, 130 *id.* 29, 45.

When the final decision in Tilden *v.* Green[1] was rendered in 1890 it was thought that the code of uses and trusts, enacted by the Revised Statutes, had been thoroughly expounded. Henceforth no one would probably attempt to make a trust even for charity which should conflict with the universal rule against perpetuities or the suspension of the power of alienation, or be indefinite in respect of the beneficiaries, or vaguely limit the trust purposes. Every charitable foundation therefore would naturally take the form of a definite legal donation to a charitable corporation, either *in esse*, or else designed to be formed under general laws within two lives in being when the limitation or donation took its legal inception. To arrive at this point of development in our law of charities had, no doubt, been a very costly performance to the public. But they had at last the consolation to know that only permanent corporate charities would be tolerated by the State, and that the pious or charitable giver must choose that form of agent for his benevolence if he desired his benefaction to be either public or perpetual. It cannot be denied that such a scheme of corporate charities presented advantages over the old system, and it was approved by many jurists and many eminent public men. The old English law of charities had been, in modern England, the fruitful source of corruption and maladministration; so much so, that even there they had finally swept it all away, substituting a new system of charities.

But just at this certain point in the law of New York the legislature enacted the act which is the subject of our consideration.[2] It provided in substance that no charitable or religious use in other respects valid should be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries of the use. Such a use or trust was primarily to be executed by the trustee designated by the settlor, and if none was nominated then by the Supreme Court. The Attorney-General was required to represent the intended beneficiaries and to enforce the use or trust. Having reference to the well-established law at the time of its passage, the act of 1893 clearly validated a charitable use which otherwise would have been invalid because of the uncer-

[1] 130 N. Y. 29. [2] C. 701, Laws of 1893.

tainty or indefiniteness of the beneficiaries. Did it do more? That is the present question.

The act of 1893 immediately gave rise to serious doubts: (1) Was it to be so construed as to withdraw charitable uses from the operation of the rule against perpetuities? (2) Did it restore the doctrine of judicial *cy pres* as formerly applied to charitable uses? Upon these questions there was room for honest differences of opinion, and it is therefore a subject for public regret that the new act—intended to cure uncertainty—should not be in itself more comprehensive. It would have been easy for the legislature to have provided that the statute against perpetuities should no longer apply to charitable uses or bequests, except in so far as the time of their vesting in possession is concerned, and, also, that all future donations on charitable uses and trusts should henceforth be so construed as to give effect to the intention of the settlor, and if that be uncertain, then that such donations should be construed as near as may be to such intention, according to the former judicial rules applied in the doctrine of *cy pres* by courts of equity. Some such additional provisions as these would have caused the act of 1893 to restore the former law of charities, except that part of it applied to the "executive" or "royal" prerogative, sometimes called the "executive" or "administrative *cy pres*" power.[1] If it was desired to confer even that power upon the chief executive or a special board of charities, so that no clear intent to establish a charity need fail, the act would have violated no fundamental principle of law if it had provided to that effect also. But the act of 1893 did nothing of the kind in terms. It simply provided that no religious, charitable or specified cognate use, should fail for indefiniteness or uncertainty of the beneficiaries. It is true the act provided for the vesting of the trusts in the Supreme Court on the contingency that no trustee was nominated, and directed the Attorney-General to represent the public or indefinite interests of the beneficiaries. But these later provisions are little illustrative of the intent of the act, as it was said in early cases that, independently of statute, the Attorney-General[2] should appear in charity cases, and

[1] By c. 291, Laws of 1901 this course has since been adopted.

[2] Andrews *v.* The Gen'l Theological Seminary, 8 N. Y. 559, 563; Owens *v.* The Mis. So. M. E. Church, 14 *id.* at p. 408.

private trusts under the Revised Statutes often devolved on the Court without the inference that the rule against perpetuities was thereby abrogated.[1]

At present the only authoritative exposition of the act of 1893 is contained in the reports of the very able decisions in the case of Allen *v.* Stevens.[2] Unfortunately, if we count all the judges who sat in that case, there seems to be a possible majority of one against the conclusion actually reached, or in all events an equal number of votes for and against the conclusion. Avoiding prolixity of statement the case of Allen *v.* Stevens involved the will of Nathan F. Graves, whereby he devised and bequeathed his residuary estate to three trustees to found, erect and maintain the "Graves Home for the Aged." There was no direction to such trustees to convey to a corporation to be formed within two lives in being, and nothing to circumscribe the trust to such statutory period. The trust was clearly such a charitable trust as would have been invalid before the act of 1893 for two causes: (1) Because the equitable title vested in no definite or certain beneficiary entitled to enforce the trust.[3] (2) Because the trust might endure longer than the permitted space of two lives, and prior to 1893 no charitable trust could contravene that period and stand.[4] It was conceded throughout the case that the act of 1893 cured the first objection. The plaintiffs, being heirs at law of testator, contended that the act did not cure the vice of a perpetuity even though the trust was charitable. On this contention the plaintiffs lost in the court of first instance,[5] succeeded on appeal in the Appellate Division,[6] but were finally defeated in the Court of Appeals.[7] It thus happened that the will of Nathan F. Graves was sustained, with the consequence that the act of 1893 tolerated an indefinite, permanent, non-corporate trust for charity.[8]

In both the Appellate Division and the Court of Appeals there were strong and able dissenting opinions delivered in

[1] 1 R. S. 730, Sec. 68. [2] 22 Misc. 158; 33 App. Div. 485; 161 N. Y. 122.

[3] Hull *v.* Pearson, 36 App. Div. at p. 237; Allen *v.* Stevens, 161 N. Y. p. 137, citing Bascom *v.* Albertson, 34 N. Y. 584; Tilden *v.* Green, 130 N. Y. 29.

[4] Allen *v.* Stevens, 161 N. Y. p. 137, citing Burrill *v.* Boardman 43 *id.* 254; Cruikshank *v.* Home for the Friendless, 113 *id.* 337; People *v.* Simonson, 126 *id.* 299. [5] 22 Misc. 158. [6] 33 App. Div. 485.

[7] 161 N. Y. 122. [8] Matter of Griffin, 167 N. Y. 71, 81.

Allen *v.* Stevens, while the majority opinions in each instance, though diametrically opposed above and below, contain able, full and fair discussions of the points involved. In view of the fact that, in the progress of the cause, it will be found that six judges voted for the conclusion actually reached and six others against it, there would seem to be no impropriety in discussing the validity of the reasons urged for such conclusion. These will be found very admirably stated in the final opinion by the Chief Judge in the Court of Appeals.

The final opinion in Allen *v.* Stevens holds that the act of 1893 is a remedial act, intended to put an end to the disastrous destruction of charitable devises by the application of the rules directed against uncertainty and perpetuities. It is then argued that if the operation of the act is limited to the preservation of devises which are uncertain only, its construction will be too limited and will apparently validate only one class of devises specified in the single case of Prichard *v.* Thompson. It is stated that most charitable devises have failed because in conflict with the rule against perpetuities. This being so it is argued that the intent of the legislature ought not to be so effectuated as to preserve devises which are too indefinite and destroy devises which conflict with the rule against perpetuities. It is also urged by the Court that if the act of 1893 is construed too literally it will impute to the legislature an intent to validate only the narrow class of devises found defective in Prichard *v.* Thompson. In that case a charitable devise was held invalid because it conflicted with the rule against indefinite trusts, although it was valid within the rule against perpetuities. There is, of course, force in the conclusion that a remedial act should not receive a narrow construction, and also great force in the statement that the legislature should not be assumed to have had in view the mischief specified in the case of Prichard *v.* Thompson only.

A ready answer to the argument stated is furnished by the dissenting opinions in Allen *v.* Stevens, when it is said in substance that the act is so plain as not to be open for construction, and that if the legislature had intended to relieve charitable uses from the operation of the rule

against perpetuities it would not have expressly validated those which were indefinite only; for the legislature must be assumed to know all the legal rules which had invalidated such uses since the Revised Statutes. No attempt seems to have been made on the argument to ascertain the class of uses which the legislature really intended to validate by the act of 1893, although, perhaps, that might have been demonstrated with reasonable certainty, and no answer is made to the argument deduced from Prichard *v.* Thompson.

It is undoubtedly true that the legislature in passing the act of 1893 did not have the class of trusts involved in the case of Prichard *v.* Thompson alone in view. That cause was decided in 1884; it excited very little public attention, and the decision was never criticised in any quarter as unjust or unfair in any respect. If we are to judge by mere proximity of dates, it is sometimes inferred that the legislature in 1893 had in mind the failure of Mr. Tilden's will in 1891,[1] and this is distinctly but guardedly intimated in Dammert *v.* Osborn.[2] Yet Mr. Tilden's will was generally understood to challenge perfectly well-fixed principles of law, reiterated by our highest courts. Indeed that will itself may be fairly described as an exceedingly rash performance, in the face of the well-known tendency of prior adjudications of our courts. Is it logical then to assume that public dissatisfaction with the fate of Mr. Tilden's perverse will contributed to the act of 1893, when we recall that the public have never been much impressed by posthumous acts of charity? One act of living sacrifice, they say, is worth a hundred acts of merely posthumous dedication. But as what the legislature had in mind when it passed the act of 1893 is entirely conjectural as a basis of construction, it is, perhaps, allowable to present any other hypothesis to account for the passage of the act.

Prior to 1893, as it will be remembered, there had been legal discussions of a class of religious devises and bequests, very dear to the hearts of a large body of earnest, religious people in this State. Such were generally devises or bequests to trustees with which to procure the offering of solemn requiem masses for the repose of the souls of those who died in the Catholic faith or communion. Requiem

[1] 130 N. Y. 91. [2] 140 N. Y. 30, 43. The intimation is distinctly *obiter*.

services, or masses, being extraordinary and not regular church services, were usually to be had only upon stipulation and indemnity of cost. In 1888 the Court of Appeals, in Holland *v.* Alcock,[1] held in substance that such a donation was a pious or charitable use,[2] and void because the beneficiary was not certain[3]. It is quite easy to perceive that this and subsequent like decisions must have greatly disturbed many pious people in this State, and we may infer that their exclamations and protests discreetly reverberated in the halls of the legislature at Albany. At all events, the act of 1893 satisfied them, for it removed all real objections to such devises or bequests[4]. That this class of trusts was in the minds of the draughtsman of the act of 1893 is tolerably certain if we note the precautionary use of the words "religious use" in that act. If we also remember that solemn requiem masses for the repose of particular souls are offered usually "within a life in being," or a tolerably short space after decease, it will be seen that devises or trusts to procure requiem masses may readily comply with the rule against perpetuities. This would account for the failure of the act of 1893 to relieve religious and charitable uses from the operation of the rule against perpetuities.

Having in view only the facts just stated, it would seem that the legislature may not have intended by the act of 1893 to validate perpetual charitable trusts.[5] But as the highest court of the State now holds otherwise we must bow to the conclusion. It is highly inexpedient in a well ordered state to question a plain decision once fairly reached by earnest and learned judges of last resort. The maxim, "*stare decisis et non quieta movere*," has lent permanence and stability to Anglo-American institutions, and it will be a sorry day for us when it is lightly disregarded. Our excuse is that the decision is not plain. It is, perhaps, also a subject of legitimate regret that the real conclusion in Allen *v.* Stevens is questioned by so many judges, both above and below.[6] An unanimous decision would have made the future

[1] 108 N. Y. 312. [2] See Gilman *v.* McArdle, 99 N. Y. at p. 459.
[3] 108 N. Y. 312; 117 *id.* 275. [4] Matter of Zimmerman, 22 Misc. 411, 413.
[5] Let the reader note that the framer of that act was very particular to use the term religious uses as well as charitable uses.
[6] There was an even vote on the question whether the act of 1893 relieved charitable uses from the rule against perpetuities. In a more recent case Cullen, J., intimates that the question is still open. Hull *v.* Pearson, 36 App. Div. at p. 237.

much clearer for charity in this State, as the act of 1893 has necessarily opened the door very widely for litigation in the future. For example, if the rule against perpetuities no longer applies to those charitable uses which are indefinite and perpetual, because of the act of 1893, is it equally sure that it applies to a charitable use which is definite and permanent? The act of 1893 surely was not intended to affect uses which are definite and certain. Other questions arise on the act of 1893; among them the extent of the relevancy of the doctrine of *cy pres*.

The doctrine of *cy pres* has again and again been held in this State, since the Revised Statutes, to be inapplicable to charitable donations. It is said in a number of cases that the doctrine in question is unsuited to our institutions and forms no part of the jurisprudence of our State.[1] After the act of 1893 it was, however, suggested that the doctrine is revived by necessary implication.[2] In one case, which was settled without appeal, the doctrine of *cy pres* was openly stated to be so revived, though that point, it is thought, was quite unnecessary to the judgment.[3] But since the decision in Allen *v.* Stevens the legislature has wisely removed all doubt, and made it quite clear that the doctrine of *cy pres* is hereafter to be applied by the Supreme Court to charities.[4] The point, therefore, is not now dependent on the construction of the act of 1893, or the decision in Allen *v.* Stevens. The doctrine of judicial *cy pres* is clearly again become a part of our jurisprudence. In view of the decision and conclusion in Allen *v.* Stevens it was probably highly expedient that the Legislature should have thus clearly affirmed the *cy pres* doctrine. But what is to be regretted is that it did not present us with a complete code of charities in one chapter, and that it has left this uncertain judicial *cy pres* power, without restraint or method, dependent on very old decisions of the English courts.

Let us consider next, for a moment, what is meant by

[1] Beekman *v.* Bonsor, 23 N. Y. 310; Holland *v.* Alcock, 108 *id.* 312; Tilden *v.* Green, 130 *id.* 29, 45.

[2] Allen *v.* Stevens, 161 N. Y. at p. 147.

[3] Racine *v.* Gillet, N. Y. Law Journal for March 30, 1901; and see 1 COLUMBIA LAW REVIEW, 400.

[4] C. 291, Laws of 1901, amending c. 701, Laws of 1893.

the doctrine of *cy pres* as applied to charities and what the effect of its adoption will be on the future of charitable donations in this State. The old doctrine of *cy pres* as applied to charities is twofold, in that it is sometimes applied to judicial functions and at others to the functions of the Crown. When it is applied to the functions of the judges it is known as judicial *cy pres*, and when applied to the functions of the Crown as prerogative or executive *cy pres*. The sources of the power in these cases are quite distinct, and one power may exist without the other. In the rejection of the whole doctrine our courts have not made any distinction, and both the judicial and the prerogative *cy pres* powers have, before the act of 1893, been distinctly repudiated; and yet there was nothing in the doctrine of judicial *cy pres* at variance with republican institutions. The royal *cy pres* power was purely an executive function. The king as *parens patriæ* was regarded by the old lawyers as the general protector of charities; indeed, he is sometimes termed their "general trustee." Whenever the Crown exercised the royal *cy pres* power, it was done under the sign manual. On the subversion of the monarchy this royal power, no doubt, vested in the legislature of this State and, until delegated, is in abeyance simply. There is, therefore, no need for us to consider at large the extent of, or the limitations upon, this prerogative power. The judicial *cy pres* power, on the other hand, is quite distinct in origin, scope and application. When well limited and defined by statute this power is conducive to justice and the growth of charitable foundations.

The judicial *cy pres* power is not strictly confined to charities. According to the jurisprudence of the common law, it applies to powers and other testamentary trusts. But in connection with the maxim "that charities are to be favored," this power formerly enabled the Lord Chancellor to give effect to a charitable testator's general trust purpose by devoting the trust property to an approximate scheme of charity, where the real scheme proved indefinite. This application is sometimes called a judicial construction *cy pres*. The adjudicated limitations on the power are many and vague. If the testator's object is sufficiently defined, the court will not depart from it on a notion of

more extended utility. If the charitable trust purpose, again, is so ambiguous as to be incapable of resolution, the trust fails and the doctrine of *cy pres* has no application. It seems difficult to realize that the act of 1893, as recently amended,[1] has opened the door to all this antique and uncertain dogma without safeguarding it by some proper statute in the shape of a charitable commission act. We have no longer eminent, or at least trained, experienced masters in chancery, content with a moderate fee bill, to devise schemes upon which a testator's estate may be safely applied to a kindred scheme, as evidenced by his general intent. In an old case, where the substance of the gift was "to the poor generally," a practical scheme *cy pres*, was thought to be one to instruct poor boys in mathematics and the art of navigation at Christ's Hospital. Thus the number of legatees was reduced to forty.[2] Imagine the same gift now in New York referred to an ordinary, or, to use a colloquialism, an "up-to-date" referee and conjure up the claims, disputes and contentions among existing charitable foundations, anxious for the fund! Consider the host of counsel, the diversity of schemes, the intolerable expense of the reference and the hearings upon the reports, and, finally, the appeals! And then consider that this is the mode in which the judicial *cy pres* power must now be applied in this State, unless, as providently suggested already by a very wise judge, who evidently foresaw the possibilities under the new law, the Court itself directs the estate to be given over to an eleemosynary or charitable corporation formed *de novo* under some general law.[3] Some such rule of the Court, it is hoped, will be speedily adopted to prevent scandal and waste from the adoption of the unrestricted doctrine of judicial *cy pres*.

Now that permanent and indefinite trusts for charity may be created in a succession of private, or non-corporate, persons, does anybody know what is the remedy for a diversion or a misapplication of the trust fund? Under the old law, the heirs of a donor were the "visitors" of the charity.[4] As such they usually received a reward, and if

[1] C. 291, Laws of 1901. [2] Att'y-Gen'l *v.* Matthews, 2 Lev. 167.
[3] Cullen, J., in Hull *v.* Pearson, 36 App. Div. at p. 238.
[4] Att'y-Gen'l *v.* Wycliffe, 1 Ves. 80.

the reward was too small the court might augment it.[1] Is this law also to be revived by implication, or is the State Board of Charities vested with visitorial powers over indefinite non-corporate charities? These and kindred questions are excited by the revival of the old law of charities. It is to be hoped competent attention may soon be directed to their elucidation. It is true that the act of 1893 contemplates that the Attorney-General shall enforce an indefinite charitable trust. But this provision clearly refers to executory trusts or to the establishment of putative devises. Does it also mean that the Attorney-General is to be the great superintending authority over executed indefinite trusts for charity, and that he is to redress all misapplications of such estates forever?

In conclusion, let us express the hope that the legislature of this State will soon address itself to devising some comprehensive act, which shall systemize the entire law of charities, prevent useless litigation and thus really foster a cause which is cherished by a large number of benevolent people in the State.

ROBERT LUDLOW FOWLER.

---

[1] Att'y-Gen'l *v.* Price, 3 Atk. 108.